

P-449/M-84-169 GRANTING TEMPORARY AUTHORITY TO RESELL LOCAL TELEPHONE
SERVICE AND DEFERRING CONSIDERATION OF REFUNDS

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

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In the Matter of an Application to Resell
Telephone Service in the State of Minnesota

ISSUE DATE: October 10, 1990

DOCKET NO. P-449/M-84-169

ORDER GRANTING TEMPORARY
AUTHORITY TO RESELL LOCAL
TELEPHONE SERVICE AND DEFERRING
CONSIDERATION OF REFUNDS

PROCEDURAL HISTORY

On April 19, 1984, Enhanced TeleManagement, Inc. (ETI) filed an application with the Commission requesting authority to resell telephone service in the State of Minnesota.

On May 1, 1984, the Commission issued an order approving ETI's application for authority to resell telephone service in the State of Minnesota.

On April 29, 1987, the Commission considered the application of Duddy Limited Partnership (Duddy) to resell local telephone service, found that Duddy's application raised the question of whether the resale of local telephone services should be allowed in Minnesota, and initiated an investigation into the question. In the Matter of an Investigation by the Minnesota Public Utilities Commission into the Resale of Local Telephone Service, Docket No. No. P-999/CI-87-228, ORDER INITIATING INVESTIGATION (April 29, 1987).

On August 1, 1988, the Commission closed its Investigation Docket No. P-999/CI-87-228 and in its place initiated Rulemaking Docket No. P-999/R-88-357 to establish rules for the sharing and resale of local telephone service. To assist the Commission in its efforts to develop these rules, the Commission established a Task Force consisting of 15 members from the state regulatory agencies and the telephone industry in the state.

On August 12, 1988, the Commission issued a Notice of Intent to Solicit Outside Information Regarding Proposed Rule Governing Resale and Sharing of Local Telephone Service for Private Use or for Profit, Docket No. P-999/R-88-357. The first question that it solicited comment upon was: Is sharing and/or resale of local telephone service in the public interest and should it be allowed in Minnesota? Notice at page 6.

In the course of the Task Force meetings, Commission Staff learned that ETI was already reselling local telephone services in different parts of the State, including Minneapolis, St. Paul and Duluth. Commission Staff informed ETI that its resale of local telephone services appeared to be without Commission authority. ETI responded that the Commission had authorized it to resell local telephone service in an Order dated May 1, 1984.

Subsequent discussions between ETI and Commission Staff did not resolve the apparent incongruity of ETI's claim to be authorized to resell local telephone service despite the fact that the Commission has not yet authorized resale of local telephone service in Minnesota.

On August 9, 1990, the Commission issued a notice of its intent to determine the scope of authority granted to ETI in its Order dated May 1, 1984.

On August 20, 1990, the Minnesota Department of Public Service (the Department), filed a letter expressing its intent not to file written comments.

On August 21, 1990, the Minnesota Business Utility Users Council (MBUUC) filed comments, and on August 22, 1990, ETI filed its comments regarding the May 1, 1984 order.

On September 5, 1990, the Commission met to consider this matter.

FINDINGS AND CONCLUSIONS

I. INTRODUCTION: THE ISSUE

Minn. Stat. § 237.16 imposes on the Commission the basic regulatory duty to see that no intrastate telephone service be provided in Minnesota unless the provider of that service has received authority to do so from the Commission. The sole exception to this rule, not invoked by or applicable to ETI, is that a "shared tenant service provider" is exempt from the certification requirement under Minn. Stat. § 237.68.

ETI does not dispute that the Commission has not approved the resale of local telephone service in Minnesota as a general matter. Despite the resulting general prohibition against resale of local telephone service in Minnesota, ETI acknowledges that it has been reselling local telephone service since approximately May 1, 1984 and asserts that this activity has been and continues to be authorized by the Commission's May 1, 1984 order in this matter.

The nature of the Commission's May 1, 1984 Order and the scope of ETI's authority thereunder, therefore, are brought directly into question.

II. DEFERRAL OF THIS QUESTION WILL NOT AID ITS RESOLUTION

ETI notes that the Commission has opened a generic proceeding to examine whether resale of local

telephone service will be allowed in Minnesota. In the Matter of a Commission Initiated Proceeding to Determine Whether the Resale of Local Telephone Service is in the Public Interest, Docket No. P-999/CI-90-235 (hereafter referred to as the 235 Docket). ETI urges the Commission to wait until it has concluded this generic proceeding before examining the scope of authority that ETI has been operating under since May 1, 1984.

The Commission finds that proceedings in the 235 Docket give no cause to delay consideration of this matter. The question before the Commission at this time is the nature of the authority granted ETI under the Commission's May 1, 1984 Order and consequently whether ETI has provided intrastate telephone service without authority between May 1, 1984 and the present. These questions are not disposed of nor is their determination aided by what the Commission determines regarding resale of local telephone service generally. Moreover, the nature of the Commission's May 1, 1984 Order is clear at this point and does not require further deliberation.

III. THE MAY 1, 1984 ORDER GRANTS ETI NO AUTHORITY TO RESELL LOCAL TELEPHONE SERVICE

Based on an examination of the text of the May 1, 1984 order and the documents and circumstances surrounding issuance of that Order, the Commission concludes that the Commission did not intend and the order did not in fact grant ETI authority to resell local telephone service.

A. ETI's Application

ETI argues that the Commission must have intended to authorize it to resell local telephone service because according to ETI when the Commission made its decision it had ETI's application before it (attached to the Department's Report of Investigation and Recommendation) and the application made it clear that ETI intended to resell both local and long-distance services. The Commission disagrees. The petition does not contain "clear statements" that local resale authority was being sought, as ETI now argues. Nowhere on the application does ETI use the word "local." ETI contends that referring to Centron as the "serving vehicle" and supplying rates for "station lines" was equivalent to stating that it intended to resell local service. These terms do not communicate what ETI claims. For example, Centron may be used in the resale of intrastate WATS. Consequently, stating that Centron will be the serving vehicle is not a comprehensible code phrase for resale of local telephone service. Likewise, "station lines" are used in the resale of intrastate WATS; therefore, ETI's inclusion of rates for station lines does not denote that resale of local service is proposed. The Commission notes that the Department's Report regarding ETI's application indicates that it did not understand this language to indicate that ETI proposed to resell local service.

Moreover, ETI's asserted references to local resale are counteracted by clear indication in the text of the application that it was applying solely for authority to resell intrastate wide area telecommunications service (WATS). The application states that ETI is submitting information "[i]n compliance with the order establishing reseller application requirements...." The only order establishing reseller application requirements at this time and hence necessarily the order referred to by ETI in its application was the Commission's ORDER ESTABLISHING RESELLER APPLICATION REQUIREMENTS issued July 13, 1983 in In the Matter of an Investigation by the

Minnesota Public Utilities Commission into the Resale and Sharing of Intrastate Wide Area Telecommunications Service, Docket Nos. P-421/CI-82-619, P-421/M-82-519, P-421/M-83-127 (hereafter referred to as the WATS Resale Docket). In that Order, the Commission established application requirements solely for resellers of intrastate WATS and did not refer to resale of local service at all. Following this introductory characterization, ETI's application consists entirely of responses to the 14 points required of applicants for authority to resell intrastate WATS.

On its face, therefore, ETI's application indicates that it is applying to the Commission for authority to resell intrastate WATS. As noted in the next section regarding the Department's review of the application, the Department understood ETI's application to be no more than that, an application for authority to resell intrastate WATS, not for authority to resell local telephone service.

B. The Department's Report of Investigation and Recommendation

If ETI's application was requesting authority to resell local service, this "fact" was lost on the Department which reviewed the application and recommended approval by the Commission. In its report, the Department made no mention of ETI's intent to resell local telephone service; instead, it advised the Commission that ETI was "...a new firm that plans to initially resell intrastate and interstate WATS."

Reinforcing the impression that the Department viewed ETI's application as requesting authority from the Commission to resell intrastate WATS, the Department's report advises that the applicant (ETI) had provided all the information required by the Commission's order which established the application requirements for resellers of intrastate WATS.

Finally, in the portion of its Report captioned Recommendation, the Department termed ETI's application an application for authority "to resell telephone services in the State of Minnesota." By using the phrase "to resell telephone services in the State of Minnesota," the Department was actually characterizing ETI's application as one for authority to resell intrastate WATS, not for authority to resell local service, as the following analysis shows.

The Department, of course, would have used the phrase "to resell telephone services in the State of Minnesota" in the sense that it was used and understood by the Commission at this time. During this period, resale of local telephone service had never even been proposed to the Department or Commission. The specific phrase "to resell telephone services in the State of Minnesota" comes from the caption above the 14 information points that the Commission adopted and required of applicants for authority to resell intrastate WATS. See In the Matter of an Investigation by the Minnesota Public Utilities Commission into the Resale and Sharing of Intrastate Wide Area Telecommunications Service, Docket Nos. P-421/CI-82-619, P-421/M-82-512, P-421/M-83-127, ORDER ESTABLISHING RESELLER APPLICATION REQUIREMENTS (July 13, 1983) at page 2.

The text of the Commission's July 13, 1983 Order, the orders which preceded it in the WATS Resale Docket, and orders issued in the three separate dockets which were later consolidated to form the WATS Resale Docket, make it clear that at this time the phrase "to resell telephone service in

Minnesota" was used exclusively to refer to resale of intrastate WATS.¹ In each of the orders leading to the July 13, 1983 order establishing application requirements, the Commission was careful to specify exactly what was before it in these dockets, i.e. resale of intrastate WATS. By the time the Commission issued its

July 13, 1983 ORDER ESTABLISHING RESELLER APPLICATION REQUIREMENTS, the subject of the proceedings (resale of intrastate WATS) had been stated innumerable times. In light of this fact and because resale of local telephone service had not even been proposed at this time, there was no need to continually use terms which highlighted the non-local nature of the service at issue.

Moreover, the text of the July 13, 1983 Order itself repeatedly refers to resellers of WATS and resale of intrastate WATS and makes clear that the 14 point application applied to resellers of intrastate WATS. No ambiguity arises from the fact that the Commission titled its order as an ORDER ESTABLISHING RESELLER APPLICATION REQUIREMENTS without specifying resellers of WATS. Nor does ambiguity arise from the fact that the caption appearing above the 14 application questions on page 2 of its order does not state that they were exclusively for resellers of WATS. The context of the Order and the lengthy proceedings preceding it confirmed that. It would be unreasonable to conclude that, after focusing on the resale of intrastate WATS in several consolidated matters beginning in October 1982, the wording of the title of its July 13, 1983 Order and caption on the 14 point requirements contained therein indicated that the Commission had abandoned its unique focus upon resale of intrastate WATS and was all of a sudden authorizing any additional, new, and as yet unproposed forms of resale (e.g. resale of local telephone service) that an applicant might propose as long as the applicant provided information on the 14 points.

Based on this analysis, the Commission concludes that when it made its recommendation regarding ETI in 1984, the Department understood and used the phrase "authority to resell telephone service in Minnesota" to mean authority to resell intrastate WATS.

C. Text of the May 1, 1984 Order

ETI argues that the language of the May 1, 1984 Order "grants ETI's application without any exceptions, reservations, or limitations." If ETI's application is understood as an application for authority to resell intrastate WATS, the Commission agrees. To the extent that ETI's application is characterized as an application to resell local telephone service, the Commission disagrees.

Several factors indicate that the Commission did not intend that its May 1, 1984 Order authorize ETI to resell local telephone service:

1. As indicated previously, at this time the term "to resell telephone services in the State of Minnesota" denoted resale of intrastate WATS and did not include the resale of local telephone service. As initiator of the phrase in its

¹ See for example the preceding orders issued in the WATS Resale Docket: ORDER INITIATING INVESTIGATION (January 3, 1983); ORDER ALLOWING RATES INTO EFFECT ONE UPON DAY NOTICE AND REQUIRING AN ACCOUNTING (February 28, 1983); and FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER (May 16, 1983).

July 13, 1983 Order, the Commission would have been aware of this.

2. Historically the Commission has taken great care in considering the full ramifications of any kind of new service or development such as resale. For example, a year prior to receiving ETI's application (May 1984), the Commission completed a thorough examination of the resale and shared use of measured intrastate WATS and approved its provision under Northwestern Bell's restructured tariff (May 16, 1983). In the several month course of its examination of the resale of intrastate WATS, the Commission sought, received and reviewed comments from several sources, including parties representing the interests of the public, i.e. the Department and the Office of the Attorney General. No such similar investigation, comment period or briefing occurred surrounding ETI's May 1, 1984 Order.
3. Three years after issuing the May 1, 1984 Order in question and immediately upon receipt of an application that it recognized as requesting authority to resell local telephone service, the Commission indicated that the application raised the question of local resale for the first time and initiated an investigation into the question of whether resale of local telephone service would be allowed in Minnesota. In the Matter of an Investigation by the Minnesota Public Utilities Commission into the Resale of Local Telephone Service, Docket No. No. P-999/CI-87-228, ORDER INITIATING INVESTIGATION (April 29, 1987).
4. The May 1, 1984 Order is not the kind of order that the Commission uses when it breaks new ground such as would have occurred if the Commission had granted ETI authority to resell local telephone service. The order in question is an abbreviated form order. Such orders are pre-drafted by the Department and used by the Commission for routine matters which are granted with such regularity that a preset form order may be safely used. The proposed summary order accompanies the Department's Report of Investigation and Recommendation. The same format and basic wording appears on all such orders. The only differences in such predrafted summary orders are that each has a separate docket number, name and address of petitioner, and the date the order is issued. Obviously, such orders are never proposed by the Department and never issued by the Commission to establish new precedents or rule on anything other than the most routine uncontroversial matters.
5. The Commission would have perceived the May 1, 1984 ETI matter as involving a request for authority to resell intrastate WATS. ETI's May 1, 1984 order was particularly brief, even for a pre-drafted summary order. It is one of a set of orders that were used to process applications to resell intrastate WATS. Except for the docket number, company name and issue date, ETI's order is indistinguishable from three orders issued to various reseller applicants prior to May 1, 1984.²

² In the Matter of a Request for Authority to Resell Telephone Services in the State of Minnesota by LDB Corporation, Docket No. 438/M-83-472, ORDER (September 6, 1983); In the Matter of an Application from LDB of Rochester, Inc. to Resell Telephone Services in the State of Minnesota, Docket No. P-440/M-83-473, ORDER (September 13, 1983); and In the Matter of a Request for Authority to Resell Telephone Services in the State of Minnesota, Docket No. P-439/M-83-534, ORDER (September 20, 1983).

During the first four years following Commission approval of the resale of intrastate WATS (May 16, 1983) and consideration of Duddy's petition to resell local telephone service (April 29, 1987), the Commission issued 17 orders in which it authorized applicants "to resell telephone services in Minnesota" or "to resell intrastate telecommunications services in Minnesota." All but one of these orders were, like ETI's order, pre-drafted summary orders.³

³ During the four year period, in addition to the three orders cited in Footnote 3, the Commission issued 13 summary orders approving applications to resell telephone services in the State of Minnesota. See: In the Matter of a Request for Authority to Resell Telephone Services in the State of Minnesota, P-449/M-84-169 (May 1, 1984).

In the Matter of the Petition for a Temporary Conditional Certificate of Public Convenience and Necessity to Operate as a Reseller of Interexchange Telecommunications Services in Minnesota, P-448/NA-84-428 (August 28, 1984).

In the Matter of an Application to Resell Telephone Service in Minnesota, P-433/NA-84-567 (October 22, 1984).

In the Matter of an Application to Resell Telephone Service in Minnesota, P-452/NA-84-615 (November 13, 1984).

In the Matter of an Application to Resell Telephone Service in Minnesota, P-432/NA-84-716 (January 15, 1985).

In the Matter of an Application to Resell Telephone Service in Minnesota, P-455/NA-85-173 (April 30, 1985).

In the Matter of the Application to Resell Telecommunication Services in Minnesota, 458/NA-85-222 (June 13, 1985). See also subsequent Department memo which uses the typical phrase of the period to characterize the authority granted: "[T]his filing authorizes Worthington to resell telecommunications service in Minnesota." (September 30, 1985)

In the Matter of an Application to Resell Telephone Service in Minnesota, P-462/NA-85-357 (June 18, 1985).

In the Matter of an Application to Resell Telephone Service in Minnesota, P-460/NA-85-248 (June 18, 1985).

In the Matter of an Application of Bemidji Long Distance Service to Resell Telephone Service in Minnesota, P-460/NA-85-248 (June 18, 1985).

In the Matter of the Application to Resell Telecommunication Services in Minnesota, P-465/NA-85-535 (December 2, 1985).

In each of these 17 cases, the Department report which recommended Commission approval analyzed the application in terms of the requirements that the Commission had adopted for resellers of intrastate WATS. In the few orders which included any analysis of the application, the Commission specifically analyzed and approved the application because it met the requirements established for resellers of intrastate WATS.⁴ These orders make it plain that during this period the Commission's term "to resell telephone service in the State of Minnesota" did not include resale of local service but was limited to resale of intrastate WATS.

In 1987, sometime after considering the Duddy petition to resell local service and initiating the local resale investigation, the Department and Commission began to add the adjective "toll", "interLATA" or "long distance" to the phrase "intrastate telecommunications services" appearing in such orders to accentuate the non-local character of the service it was authorizing for resale. Until Duddy's petition raised the possibility of reselling local service, such a distinguishing phrase, of course, had been unnecessary because prior to Duddy, all parties connected with the Commission's regulation of telephones knew that the Commission had not authorized and was not even considering the authorization of local resale.

During the seven year period since the Commission approved resale of interstate WATS (May 16, 1983) and adopted the application requirements for resellers of intrastate WATS (July 13, 1983) and regardless of how the service was termed, the Department's recommendations and the Commission's grant of resale authority has always been restricted to resale of long distance service and always required applicants to respond satisfactorily to the 14 requirements established in the July 13, 1983 Order. ETI's Order is no exception to this well established pattern.

IV. NO NEED TO REVOKE ETI'S AUTHORITY TO RESELL LOCAL SERVICE

ETI notes that if the Commission removes ETI's authority to resell local telephone service, it must provide ETI with notice and a hearing on the matter and may only remove such authority for failure to furnish reasonably adequate telephone service pursuant to Minn. Stat. § 237.16. ETI is correct and the Commission would provide such a hearing and decide the matter on the standard cited if it were removing ETI's authority to resell local telephone service.

However, based on the analysis of the Commission's May 1, 1984

In the Matter of a Petition for a Certificate of Public Convenience and Necessity to Operate as a Reseller of Telecommunications Service in Minnesota, P-463/M-85-722 (December 31, 1985).

In the Matter of the Application of Brainard Telecom, Ltd. for Authority to Resell Telephone Services in Minnesota, P-475/NA-87-24 (March 4, 1987).

⁴ See, for example, the Commission's terminology and analysis in the one non-summary order on this subject: In the Matter of the Application of MidAmerican Long Distance Company to Resell Intrastate Telecommunications in the State of Minnesota, P-461/NA-85-286 (October 15, 1985).

order and ETI's authority thereunder, it is clear that ETI has never held a certificate of authority to resell local telephone service in Minnesota and, hence, the Commission is removing nothing from ETI in declaring it to have been to-date without authority to resell this service.

V. GRANT OF INTERIM AUTHORITY TO RESELL LOCAL TELEPHONE SERVICE

While ETI has no current authority to resell local telephone service in Minnesota, the Commission will not require ETI to cease its operations at this time. The Commission concludes that it would be in the public interest to allow ETI to operate as a local telephone service reseller on an interim basis pending the outcome of the Commission's investigation into the resale of local telephone service in Docket No. P-999/CI-90-235. In the meantime and commencing with this Order, ETI will have temporary authority, as was granted to the other known local reseller, Duddy, in 1987. Duddy, Docket No. P-467/NA-86-141, ORDER GRANTING PERMANENT AUTHORITY TO RESELL LONG DISTANCE SERVICE AND TEMPORARY AUTHORITY TO RESELL LOCAL TELEPHONE SERVICE (April 29, 1987).

Further, the Commission will permit ETI to continue to receive the local service that it resells from Northwestern Bell Telephone Company (NWB) under NWB's Joint-User Tariff until NWB files a formal local resale tariff following the Commission's finding, if it so finds, that local resale is in the public interest at the conclusion of Docket No. P-999/CI-90-235. In allowing continued service to ETI on a temporary basis under the Joint-User Tariff, the Commission is not indicating that this tariff authorized sale to ETI previous to this Order or that it has been or is an appropriate tariff for sale to any other local reseller.

VI. THE DOCTRINE OF EQUITABLE ESTOPPEL DOES NOT PRECLUDE THE COMMISSION FROM DENYING THAT ETI HAS HAD AUTHORITY TO RESELL LOCAL TELEPHONE SERVICE UNDER THE COMMISSION'S MAY 1, 1984 ORDER

To establish a claim of equitable estoppel against a state agency, a person must show that he or she reasonably relied upon misrepresentations made by the agency, that the misrepresentations constituted affirmative misconduct, and that he or she will be harmed by the reliance unless estoppel is granted. Ridgewood Development Company v. State, 294 N.W.2d 288 (Minn. 1980); Matter of Westling, 442 N.W.2d 328 (Minn.App. 1989). ETI cannot make this showing.

A. No Affirmative Misconduct/No Reasonable Reliance

ETI's examples of alleged reasonable reliance on Commission misrepresentations are discussed below:

1. The May 1, 1984 Order

As explained earlier in this Order, the Commission's May 1, 1984 order simply granted ETI

authority to resell intrastate WATS and did not grant authority to resell local telephone service. The phrase "resale of telecommunications service" had a specific meaning at that time which was reasonably adequate to describe what was authorized. The fact that resale of telecommunications later came to include the resale of local telephone service does not render the use of that phrase in 1984 affirmative misconduct.

2. ETI's Annual Reports

Minn. Stat. § 237.11 (1988) requires that telephone companies file an annual report with the Commission and the Department. ETI argues that it provided information in the reports it filed annually pursuant to this statute that alerted or should have alerted the Commission to the fact that it was reselling local telephone service. ETI suggests that the Commission's subsequent failure to notify it that it did not have authority to resell local telephone service now estops the Commission from denying that ETI has had authority to resell telephone service since May 1, 1984.

Annual reports are not submitted or reviewed for purposes of ensuring that telephone companies are operating within the scope of their authority. They are primarily financial reports, consisting of an end-of-year balance sheet and any other information requested by the Department. They are intended to give regulators and interested members of the public basic financial information about the company and its financial performance over the previous twelve months.

Moreover, ETI's annual reports do not clearly indicate that ETI was reselling local service as ETI asserts. To the contrary, with the exception of the 1984 report which is simply denominated "Annual Report", the annual reports ETI filed in subsequent years were all titled "Interexchange Carrier Annual Report" which identifies ETI as a long distance provider. In addition, in each of its annual reports from 1985-1988 ETI clearly indicated that it obtained all its Minnesota revenues through the sale of long distance (toll) service, thereby representing that it was not engaged in the resale of local telephone service in Minnesota. In such circumstances, it would have been unreasonable for the Company to construe Commission silence following the filing of such annual report(s) as approval of its resale of local telephone service.

3. ETI's Payment of Assessments

ETI notes that starting in 1984, it paid the assessments required by Minn. Stat. § 237.295 (1988) to the Department and Commission. ETI states that as part of its computation of the assessments, the Department reviewed ETI's financial results. ETI does not indicate how the Department's review of ETI's financial data would have informed it that ETI was reselling local telephone service.

The Commission concludes that it would have been unreasonable for ETI to construe acceptance of its regulatory assessments as approval for ETI to resell local telephone service.

4. The Department's Report in the Local Resale Investigatory Docket

ETI notes that at page 21 of the Department's November 1987 Report on the Resale of Local Telephone Service the Department stated:

ETI resells local service by using a NWB product--Centron service.

The Commission does not agree that the Department's incidental inclusion of this phrase in its 32 page report, and the Commission's failure to take immediate action on the information it communicated, constitute grounds for equitable estoppel. A central issue in the docket in which the report was submitted was whether resale of local telephone service was in the public interest. It would not have been reasonable for ETI to rely on this report as confirming its authority to resell local service. To the contrary, the nature of the proceeding should have alerted ETI that the propriety of local resale was still an open issue to the Commission.

5. ETI's Comments in the Local Resale Investigatory Docket

On January 21, 1988, ETI submitted comments regarding the Commission's investigation into local resale of telephone service. Docket No. P-999/CI-87-228. ETI characterized itself as follows:

ETI is a Minnesota corporation which, since 1984, has provided its customers with 'horizontal' shared tenant service ('STS') by reselling Northwestern Bell's ('NWB') own central office services, commercially known as Centron.

In so doing, ETI indicates, it was stating to the Commission that it was a reseller of local telephone service. The Commission finds the characterization equivocal. By the time this comment was filed, the Minnesota legislature had authorized shared tenant services (STS) and indicated that if the STS provider complied with certain statutory requirements, it would not need to obtain a certificate of public convenience and necessity from the Commission. Minn. Stat. § 237.68 (1988). ETI appears to be characterizing itself in this filed comment as an STS provider rather than as a reseller of local telephone service.

6. ETI's Failure to File Tariffs or Price Lists

Further, the Commission notes that subsequent to the May 1, 1984 Order, ETI never inquired directly of the Commission or Commission Staff regarding the scope of its authority under the Order and never submitted local rates for review and approval by the Commission as required by Minn. Stat. § 237.07. Unlike the filing of annual reports, such a filing would have precipitated an actual review by the Commission of ETI local resale activity.⁵ Being charged with knowledge of the law, it must be assumed that ETI knew this.

B. Balancing the Equities

The Commission is required to "balance the equities" only after reasonable reliance induced by government misconduct has been shown. ETI has not shown, nor can it show, reasonable reliance on misrepresentations amounting to affirmative misconduct. Even if it could, however, estoppel

⁵ ETI's failure to file rates for its resale of local service has been cited by the Department in a Complaint which is being processed in Docket No. P-449/C-89-1026.

might well be inappropriate under the balancing of the equities which would follow. The Commission need not reach that issue today, both because the Company has failed to make the initial showing required in order to proceed to balancing the equities and because in allowing ETI to continue its operations under interim authority, the Commission has not caused ETI the harm alleged in its claim of equitable estoppel.

C. Inapplicability of Hallberg

ETI relies heavily on the Minnesota Court of Appeals decision in Petition of Hallberg Construction and Supply, Inc., 385 N.W.2d 381 (Minn.App.1986). In Hallberg, the court held that the Minnesota Transportation Regulation Board was estopped from denying petitioner Hallberg's petition for a statewide permit. ETI asserts that the facts of Hallberg are so similar to the instant case that the Commission must be estopped from reducing or eliminating any of the authority it allegedly granted in 1984. The Commission disagrees. Contrary to ETI's assertion, the facts of Hallberg are not similar to those of this case.

In Hallberg, the court focused upon affirmative actions taken by the Department of Transportation after receiving actual knowledge that Hallberg was operating outside his authorized area. The Department conducted ten or eleven document audits that indicated Hallberg was operating statewide. Also, on numerous other occasions, the Department reviewed Hallberg's permit applications which clearly showed origin and destination points outside Hallberg's authorized geographic area. After reviewing these applications, the Department issued special permits to Hallberg for hauling oversize or overweight loads beyond his authorized area. In the current case, the elements of actual knowledge and affirmative actions are not similarly present.

In addition, unlike ETI, Hallberg reasonably believed that he had a statewide permit because when he bought the trucking business, the Public Service Commission had failed to send him notice that geographical limitations had been placed upon his permit. To the contrary in the current case and as previously discussed, ETI had reason to know that the authority it received in the May 1, 1984 Order did not include authority to resell local telephone service.

Clearly, the facts in Hallberg and the facts of this case bear little resemblance to one another. This, together with the Court of Appeals' subsequent clarification of the need for "affirmative misconduct" in estoppel cases, lead the Commission to conclude that Hallberg does not require the Commission to honor the Company's estoppel claim.

D. Conclusion Regarding Equitable Estoppel

For the reasons set forth above, the Commission finds the doctrine of equitable estoppel does not preclude the Commission from declaring that ETI has had no authority to resell local telephone service prior to this Order.

VII. REFUND OF REVENUE FROM THE UNAUTHORIZED SALE OF TELEPHONE SERVICES

The Commission will make no determination at this point regarding ETI's liability to refund the revenues it has received from the unauthorized resale of local telephone service prior to receiving temporary authority to provide such service in this current Order.

ORDER

1. The Commission finds that its May 1, 1984 Order in this matter did not grant authority to Enhanced TeleManagement, Inc. (ETI) to resell local telephone services in Minnesota and concludes that ETI received no authority under said Order to resell local telephone service in Minnesota.
2. ETI is hereby granted temporary authority to resell local telephone service in Minnesota pending further order of the Commission following the conclusion of the Commission's investigation into the resale of local telephone service in Docket No. P-999/CI-90-235.
3. ETI is hereby authorized on a temporary basis to receive for resale and Northwestern Bell Telephone Company (NWB) is authorized on a temporary basis to provide ETI with local telephone service for resale under NWB's Joint User Tariff until further order of the Commission.
4. The Commission defers action with respect to the question of ETI's liability to refund revenues from the resale of local telephone services during the period in which it had no authority to provide such services.
5. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Richard R. Lancaster
Executive Secretary

(S E A L)